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SOUTHERN DISTRICT
OF TEXAS

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Southern District of Texas
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TO THE HONORABLE MELINDA HARMON,
UNITED STATES DISTRICT JUDGE:

Defendant Kenneth L. Lay ("Lay") submits this short Reply to Defendant Vinson & Elkins, L.L.P.'s ("VE's") Memorandum Concerning Discovery of Examiner Transcripts and to the Additional Memorandum of Certain Financial Institutions Regarding Examiner Transcripts. The great majority of the arguments set forth in the recent filings by VE and the Financial Institutions already have been adequately addressed in Defendant Lay's original Memorandum Concerning Discovery of Examiner Transcripts ("Lay Mem.") and in the original Memorandum, Supplemental Memorandum, and Reply filed by the Outside Directors, with respect to these same issues. But, as with respect to his original Memorandum, Lay submits this Reply in order to bring to bear the circumstances of one who is currently being sued by a party – the Official Committee of Unsecured Creditors of Enron Corporation ("Creditors' Committee") – that possesses, has used, and is using the Examiner Transcripts and other materials assembled by the Examiner to prosecute claims against him. At least from the perspective of someone like Lay, a Defendant in the Creditors' Committee's lawsuit, the pivotal flaw in the arguments advanced by VE and by the Financial Institutions is their failure to recognize that the genie – in the form of the Examiner Transcripts and documents – is already out of the bottle and at the disposal of Lay's opponent in litigation. No party has identified any authority that would justify prohibiting Lay from obtaining access to these materials upon which the Creditors' Committee is prosecuting its lawsuit against him.

ARGUMENT

These facts are undisputed:

1. The Creditors' Committee filed suit against Lay and others in a Texas State Court on October 1, 2002, *Official Committee of Unsecured Creditors of Enron Corp. v. Fastow, et al.*, No. 02-10-06531-CV (9th Judicial District Court, Montgomery County, Texas) ("Creditors' Committee Lawsuit"). The Creditors' Committee substantially expanded and amended its lawsuit in December, 2003. See Plaintiff's First Amended Petition, *Creditors' Committee Lawsuit*, Exh. A to Lay Mem.

2. The "Creditors' Committee [has] access to virtually all of the information obtained by the Enron Corp. Examiner in the course of the Enron Corp. examination" Motion of Neal Batson, the Enron Corp. Examiner, with Respect to Certain Procedural Issues ¶ 12 (attached as Exh. F to Outside Directors Mem.); Lay Mem at 4. More specifically, the Creditors' Committee has transcripts of more than 200 sworn statements accumulated during the Examiner's investigation. See Second Supplemental Brief in Support of Motion of Neal Batson, the Enron Corp. Examiner, with Respect to Certain Procedural Issues, at 5 & Listing of Sworn Statements, Exh. A thereto (both attached collectively as Exh. 1 to Supplement to Outside Directors' Memorandum Concerning Discovery of Examiner Transcripts).

3. The Creditors' Committee has used the Examiner Transcripts and other materials to pursue the Creditors' Committee Lawsuit. See Lay Mem. at 5-6; Emergency Motion of Official Committee of Unsecured Creditors ¶ 16 (Exh. E to Lay Mem.).

4. Whether the Creditors' Committee Lawsuit proceeds in this Court, to which it is now removed, or in Texas State Court, Lay will request production of all materials provided to the Creditors' Committee by the Examiner, and – apart from the controversy now being addressed by this Court – will be entitled to those materials under applicable rules of procedure. See, e.g., TEX. R. CIV. P. 192.3(h).

5. Counsel for the Creditors' Committee has stated that the Committee, itself, is willing to provide Lay and the other Defendants in the Creditors' Committee Lawsuit with the Examiner Transcripts and other materials in the Committee's possession. See Lay Mem. at 8. The Enron Corp. Examiner has stated on several occasions that discovery of such materials may be sought from the Creditors' Committee. See, e.g., Lay Mem. at 7; Second Supplemental Brief of Examiner at 5.

6. Judge Gonzalez's Order of December 8, 2003, does *not* preclude disclosure, discovery, or use of the Examiner Transcripts in the Creditors' Committee Lawsuit. *See* Order Granting Motion for Protective Order, attached as Exh. B to Financial Institutions' Supplemental Filing in Opposition to Lead Plaintiff's Motion to Compel.¹

No one takes issue with any of these facts, nor could they. Yet these undisputed facts establish, at the very least, that Lay and the other Defendants to the Creditors' Committee Lawsuit are entitled to discovery of the Examiner Transcripts and other materials that have been provided to and used by the Committee to prosecute its lawsuit.

These facts separate this case from the authorities relied upon by the Financial Institutions and VE. In neither *In re Ionosphere Clubs, Inc.*, nor *In re Baldwin United Corp.* were the Examiner materials in question used to prosecute lawsuits or claims against third parties. *See In re Ionosphere Clubs, Inc.*, 156 B.R. 414, 431-36 (S.D.N.Y. 1993); *In re Baldwin United Corp.*, 46 B.R. 314, 316 (Bankr. S.D. Ohio 1985). Obviously, therefore, in neither *Ionosphere* nor *Baldwin* was disclosure of Examiner materials sought by a Defendant against whom those materials had been used. Those cases, therefore, provide no basis for barring Lay and the other Creditors' Committee Defendants from securing access to the Examiner Transcripts relied upon by the Committee in its Lawsuit.

¹ With due respect to Judge Gonzalez, his Order should not be considered binding upon litigants, such as Lay, who were not parties to the proceeding in which it was entered, in any event. VE and the Financial Institutions argue that notice was given to all parties in the *Newby* case, which gave them the opportunity to appear and contest the proposed Order, and therefore that those parties should be bound. This, however, ignores the consistent position articulated by Lay, and by others, that they are not subject to the jurisdiction of the Bankruptcy Court, and will not consent to jurisdiction by appearing in a discovery dispute between other parties. Although the Creditors' Committee has filed a second action against Lay – an adversary proceeding pending before the Bankruptcy Court under Adversary No. 03-02075(AJG) – Lay sought to remove the reference of that proceeding to District Court and has persistently objected to the Bankruptcy Court's jurisdiction in that matter.

Had the Examiner Transcripts been retained by the Examiner and not released for use by the Committee (and by Enron, the Debtor) for use in prosecuting claims against third parties, had the Examiner released only his reports and not shared his investigative materials, then the dispute before this Court *might* be different. But the fact is, the materials *were* provided to the Committee, and they were used by the Committee against third-parties like Lay. At that point, the customary and traditional tools of discovery in that third-party litigation must control the discoverability of those materials.

Neither VE nor the Financial Institutions directly addresses the status of someone like Lay – a Defendant in a case in which the Plaintiff has had access to and used the Examiner Transcripts and materials against him; but they make several attempts to skirt that situation. The Financial Institutions, for example, essentially try to ignore it, arguing, “The Outside Directors, the various Financial Institutions, Arthur Andersen, Vinson & Elkins, and others are in exactly the same position: each party has its own sworn statements, but nothing more.” Additional Memorandum of Certain Financial Institutions at 15. But, of course, that is not true in the Creditors’ Committee Lawsuit. The Creditors’ Committee has “virtually all” of the Examiner Transcripts, while Lay has none.

Next, both VE and the Financial Institutions suggest that it is premature to consider the use of the Enron Transcripts by the Creditors’ Committee in its Lawsuit or by Enron in *Tittle*, charging that Lay and the Outside Directors are simply basing their arguments on “‘what if’ scenarios.” *Id.* at 15; VE Mem. at 12 (“When and how Enron or the Creditors’ Committee may use the transcripts has yet to be decided.”) But this argument ignores reality. “Use” does not equal, and is not limited to, “disclosure.” The

Creditors' Committee already has used the Examiner Transcripts to formulate its Amended Petition, and has guarded its ability to continue to use those materials in the future. *See* Lay Mem. at 5.

Further, as the Outside Directors also have discussed, given the language of the Confidentiality "Stipulation" signed by VE and representatives of the Examiner, the Committee, and Enron, VE can hardly claim surprise that these materials are being used by the Committee in its lawsuit against Lay and others – or that, predictably, Lay and others will seek disclosure of the materials being used against them. In that Stipulation, VE concedes that its "Confidential Information" may be used in "the prosecution of claims" by "the Committee against third-parties, including VE." Stipulation, ¶ 10, attached as Exh. B to VE Mem. One can only assume that the Financial Institutions signed Stipulations with similar provisions. What's more, at the time these Confidentiality Stipulations were signed, and the sworn statements were given, the Creditors' Committee Lawsuit had already been on file for many months (even though it was amended and expanded after these statements were taken, apparently in reliance in part upon them).² Thus, when these authorizations for the Committee's use of this information was given, litigation against third-parties was not merely a possibility; it was

² *See, e.g.*, Third Interim Report of Neal Batson, Court-Appointed Examiner, Appendix D at 9 n. 21 (listing sworn statements of six CitiGroup representatives taken between April and June, 2003); *id.*, Appendix E at 21 n. 71, 28 n. 93, 43 n. 144, 46 n. 154 (listing sworn statements of four J.P. Morgan representatives taken in April and May 2003); *id.*, Appendix F at 9 nn. 18-20 (listing three executives of Barclay's, taken in April, May, and June, 2003); *id.*, Appendix G at 9 n. 29, 10 n. 35, 12 n. 42, 15 n. 52 (listing sworn statements of six representatives of Deutsche Bank and Banker's Trust taken in April and May, 2003); App. H at 5 n. 5, 6 n. 8, 10, n. 13 listing sworn statements of seven representatives of CIBC taken in April and June, 2003); App. I at 9 nn. 29-30, 13 n. 43 (listing sworn statements of three Merrill Lynch representatives taken in April, May, and June, 2003); and Final Report of Neal Batson, Court-Appointed Examiner, Appendix C at 21 nn. 51 & 53, 22 nn 56-59 (listing sworn statements of six current or former VE attorneys given between July and October, 2003).

reality. If VE and the Financial Institutions had wished to prevent disclosure of the sworn statements to third-parties, they should have demanded a Stipulation that prohibited use of those materials by the Committee against third-parties.

Finally, as has previously been noted, both the Creditors' Committee and the Examiner have indicated their willingness for third-parties to pursue discovery of the Examiner Transcripts and materials from the Committee.³ The Financial Institutions and VE discount this, because they contend it is not the interest of the Examiner and the Committee that are in issue, but the confidentiality of those who provided the sworn statements and the interests of the Bankruptcy Court in the integrity of the examination process. But this argument misses the mark in two ways. First, as explained above, once the Examiner provided the transcripts and other materials to the Creditors' Committee for use against third-parties, and once VE and others consented to that use, confidentiality effectively evaporated upon use of those materials by the Committee or Enron. Second, it must be remembered that it is the Examiner and the Committee, along with the Debtor, who were the direct participants in and guardians of the examination process in the Enron bankruptcy. Their willingness to allow discovery of these materials belies the idea that – at least under circumstances such as these, where the materials have been used in third-party litigation – disclosure will improperly undermine the examination process.

³ The Committee has indicated no intention to claim work product privilege or immunity with respect to the Examiner Transcripts (nor could it), thus eliminating VE's procedural argument on that score. *See* VE Mem. at 11.

CONCLUSION

For the reasons stated in his original Memorandum, as well as for the reasons set forth above and those articulated by the Outside Directors in their various memoranda, Defendant Lay respectfully prays that this Court authorize and not bar the disclosure and discovery of the Examiner Transcripts, at least with respect to those materials that the Examiner has shared with the Creditors' Committee. Further, because the Creditors' Committee Lawsuit is proceeding in coordination with *Newby*, Lay respectfully prays that disclosure of those materials be made available to all parties to the coordinated proceedings, in recognition of principles of fundamental fairness.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Defendant Kenneth L. Lay's Reply in Support of Discovery of Examiner Transcripts was served on all counsel on this 25th day of February, 2004, by posting to www.esl3624.com.

Ken Carroll - with permission